No. 22011

In the
United States Court of Appeal
For the Ninth Circuit

JAMES H. MORRISON,
Appellant,

vs.

HERBERT V. WALKER,
Appellee.

Appellee's Brief

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Appellee's Brief

COMES NOW the appellee HERBERT V. WALKER, Judge of the Superior Court of the State of California for the County of Los Angeles, and presents herewith his brief on appeal:

STATEMENT OF FACTS

Although appellant has a portion of his brief labeled Statement of the Case (pp. 4-6), the said statement is incomplete, argumentative and misleading. Therefore, appellee deems it necessary to set forth the facts herein.

Appellant herein was tried and convicted of a violation of section 26104 (subdivision a) of the California Corporations Code (part of the Corporate Securities

Law) by appellee in the latter's capacity as a judge of the Superior Court of California in 1957. (Superior Court, Los Angeles County case No. 184742) Appellant filed an appeal from this conviction, which was affirmed by the various appellate tribunals. In the California District Court of Appeal, the appellate tribunal specifically upheld the constitutionality of the provision of the California Corporate Securities Law of which appellant was convicted, and upheld the jurisdiction of the Superior Court to try and convict the appellant [*People v. Ben I. Rankin and James H. Morrison,* (1959) 169 C.A. 2d 150, 337 P. 2d 182]. Further petition for hearing in the California Supreme Court was denied on May 20, 1959, and certiorari was denied by the United States Supreme Court in 80 S. Ct. 616 (362 U.S. 905; 4 L. Ed. 2d 556). After completion of the appellate process, the state prison sentence was put into effect in 1960, and appellant completed his prison term in 1965.

On May 10, 1966, appellant filed his original complaint in the present case "in the nature of quo warranto." Appellant's apparent theory was that appellee, Judge Walker, in convicting him had failed to declare the California law in question unconstitutional, and by failing to do so had violated his oath of office and therefore should be ousted from his judicial office. Appellee's motion to dismiss the original complaint was granted with leave to amend. A First Amended Complaint was filed and met a similar fate. A Second

Amended Complaint was filed and met a similar fate. Finally, in January, 1967, appellant filed a Third Amended Complaint seeking merely declaratory relief —in effect, a declaration that appellee, by trying and convicting appellant under California law violated his (appellant's) constitutional rights.

Appellant made a motion to dismiss and motion for summary judgment as to the Third Amended Complaint, pointing out, *inter alia,* that appellant was being sued for his judicial acts, and that, in any event, declaratory relief is not available to determine whether rights heretofore adjudicated were properly adjudicated. This motion was granted, judgment was entered thereon, and appellant prosecutes this appeal from said judgment.

THE ISSUES

1. Is declaratory relief available to a defendant who has been convicted of a crime under state law, failed in his appeal therefrom to the highest court of the land, and served his sentence — to declare that the trial judge violated the federal constitutional rights of the convicted criminal by not declaring the state law unconstitutional?

2. Was there a clear absence of all jurisdiction in appellee when the latter, as a judge of the California Superior Court, tried and convicted appellant of a violation of the California Corporate Securities Law?

ARGUMENT

I

THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

A. THERE WERE NO MATERIAL ISSUES OF FACT REMAINING.

Appellee would agree with appellant, as stated on page 8 of his Opening Brief, that a trial court's function in passing on a motion for summary judgment is to determine whether a genuine issue of fact exists for trial. *Matlack Inc. v. Butler Mfg. Co.* (1966) 253 Fed. Supp. 972. An examination of the record on appeal discloses clearly that, after considering the affidavits in support of, and in opposition to, the motion for summary judgment, absolutely no issue of fact existed.

Appellant argues that issues of fact which did exist included the allegations that:

1) Appellee proceeded to deprive appellant under color of state law of his liberty without due process of law (Brief, p. 8);

2) Appellee found appellant guilty, sentenced him, and thereby enforced a penal enactment repugnant to the Equal Protection Clause of the Fourteenth Amendment (Brief, p. 9).

The only *facts* (as distinguished from conclusions of law) stated in these arguments are that appellee found appellant guilty and sentenced him. But there

is no issue of fact here since Judge Walker, in his affidavit, expressly states that he found James H. Morrison guilty and sentenced him.

The balance of the allegations that appellant relies on as creating issues of fact are sheer conclusions of law: whether appellant was deprived of his liberty under color of state law without due process is clearly a question of law; similarly, whether appellant had enforced against him a penal enactment repugnant to the Equal Protection Clause of the Fourteenth Amendment is a question of law.

There is no genuine issue over the fact that Judge Walker's only contact with appellant was in the Judge's judicial capacity, because appellant states no facts showing any other and non-judicial contacts. If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts stated in the affidavit of the party opposing the motion, they are admitted. (Local Rule 3, subd. g (3), Rules of the United States District Court, Central District of California). That appellant himself admits he is suing Judge Walker for the latter's judicial act is apparent from appellant's statement of the issue on page 6 of his Opening Brief: "Is a judge immune from suit arising out of his judicial acts. . . ."

Thus, there being no material issue of fact remaining, it is clear that the trial court was justified in granting the motion for summary judgment.

B. DECLARATORY RELIEF WAS NOT AVAILABLE TO APPELLANT AS TO ACTS OCCURRING IN THE PAST.

The most obvious failure of the allegations of the Third Amended Complaint is that it seeks declaratory relief with reference to a case which is long since *res adjudicata.*

In effect, appellant seeks a declaration from the court that the appellee's judgment, rendered as a judge of the Superior Court of the State of California, violated appellant's rights to due process and equal protection. But the remedy of declaratory relief is not available where no more than an advisory opinion is sought. *Hurst v. United States,* (CCA Okl.) 203 F. 2d 710, cert. den., 98 L. Ed. 1133. In our case the rights of appellant have long since been determined in the criminal case in which he was convicted more than a decade ago; on appeal therefrom, the conviction was affirmed all the way to the highest court of the land. Clearly there is no justiciable controversy remaining; the mere existence on the books of a criminal statute of a state does not of itself present a justiciable controversy. *Hitchcock v. Kloman* (Md.) 76 A. 2d 582.

The primary purpose of the Declaratory Judgment Act was to provide a declaration of rights not yet determined, not to, in effect, second-guess a judicial decision which had already been made. *Clark v. Memolo* (C.A. D.C.) 174 F. 2d 978, 981.

Appellee submits that appellant has not stated any justiciable controversy which could be determined by declaratory relief.

C. THE SUPPORTING AFFIDAVIT ON THE MOTION CLEARLY SHOWED THAT JUDGE WALKER HAD PERSONAL KNOWLEDGE.

Appellant urges the technicality that the affidavit of Judge Walker in support of the motion for summary judgment did not specifically *state* that Judge Walker was competent to testify to the matters stated therein. But the rule in question, Rule 56(e) Fed. Rules Civ. Proc., merely requires that such affidavits *show* that the affiant is competent to testify thereto.

In subject case, certified copies of the certificates of the County Clerk relating to judicial appointment and election together with the Oath of Office (as judge) subscribed and sworn to by appellee were incorporated as part of the affidavit in question. These, of themselves, clearly and affirmatively showed that Judge Walker was competent to testify as to the subject matter of the affidavit. Even without this, however, the prior complaints in this case (part of the record herein) all alleged that appellee was a judge of the Superior Court. See, e.g., paragraph I of the original Complaint for Quo Warranto, filed in the District Court, May 10, 1966. Finally, it must be ap-

parent from a reading of the affidavit that Judge Walker had personal knowledge of the case in question.

However, even if we were to disregard the affidavit of Judge Walker *in toto,* it is nevertheless apparent that plaintiff could state no claim for declaratory relief as to a transaction that had long since been finally determined by the courts.

II

THERE WAS NO CLEAR ABSENCE OF ALL JURISDICTION IN APPELLEE.

A. JUDGE WALKER WAS ACTING IN A JUDICIAL CAPACITY.

Appellant appears to concede by his statement of the issue on page 6 of the Opening Brief, that the subject of this complaint is a judicial act by Judge Walker.

If there is any question about this fact, however, the court's attention is respectfully called to the affidavit of Judge Walker annexed to the Motion for Summary Judgment, part of the record on appeal herein. It is apparent that Judge Walker is being sued for the trial and conviction of appellant. Judges are immune to suit, however, unless there is a clear absence of all jurisdiction.

Pierson v. Ray, 87 S. Ct. 1213, 18 L. Ed. 2d 288;
Agnew v. Moody, (9th Cir. 1964) 330 F. 2d 868;

Johnson v. MacCoy, (9th Cir. 1960) 278 F. 2d 37;
Larson v. Gibson, (9th Cir. 1959) 267 F. 2d 386;
Herman v. Superior Court, (9th Cir. 1964) 329 F. 2d 154.

In subject case, as noted hereafter, there was not a clear absence of all jurisdiction in appellee.

B. AN OFFENSE UNDER SECTION 26104 CORPORATION CODE WHERE SENTENCE IS TO THE STATE PRISON IS A FELONY WITHIN THE JURISDICTION OF THE SUPERIOR COURT.

Appellant's apparent theory is that since section 26104 Corporation Code does not use the specific term "felony," that, therefore, the crime described could not be a felony and therefore the superior court (in the person of Judge Walker) was without its jurisdiction in trying, convicting and sentencing appellant. (See page 16, Opening Brief.)

But, where a penalty is specifically authorized by statute, the label that the legislature may place on a crime does not determine whether it is a felony or a misdemeanor. The section in question expressly provides that its violation is a public offense punishable, *inter alia,* by imprisonment in the state prison. Section 17 of the Penal Code expressly provides that a felony is a crime which is punishable by death or by imprisonment in the state prison. It is clear, therefore,

that if appellant was sentenced to state prison (as he admits he was) under section 26104 Corporation Code, he was convicted of a felony. Article VI section 5 of the California Constitution (as it existed prior to the 1966 amendments) provided that superior courts had original jurisdiction in all criminal cases amounting to a felony.

The most common definition of the term "jurisdiction" is that it is "the power to hear and determine" the case. *Abelleira v. District Court of Appeal,* (1941) 17 C. 2d 280, 288; 109 Pac. 2d 942. At the very least, where a question is raised as to jurisdiction, the trial court has power to rule on the question of its own jurisdiction. In subject case, appellant is contending that, in spite of the constitutional and statutory provisions cited above, appellee, sitting as a judge of the Superior Court, should have questioned his own jurisdiction on his own motion and should have concluded that he had no jurisdiction. It is readily apparent that no such burden devolves upon a trial court where the law so clearly, as in this case, vests it with jurisdiction to "hear and determine" the case.

Appellant further argues that since section 26104 Corporation Code provides for different alternatives in the way of punishment (fine, jail sentence, prison sentence) that it, therefore, is repugnant to Equal Protection. However, California law has frequently recognized that the judge should be granted certain dis-

cretion as to the quantity or type of punishment to be meted out to a criminal offender such as appellant. In fact since 1872, the Penal Code of California has provided in section 654 thereof:

> "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one. . . ."

In other words so long as a criminal is not punished more than once for the same crime, there is no objection to providing different modes of punishment available to the court in its discretion.

In any event, the jurisdiction of the appellee to try and convict appellant in the subject case was decided finally almost a decade ago and is long since *res adjudicata. People v. Rankin and Morrison* (1959) 169 C.A. 2d 150, 337 P. 2d 182; Hearing denied by California Supreme Court, May 20, 1959; certiorari denied by United States Supreme Court in 80 S. Ct. 616 (362 U.S. 905; 4 L. Ed. 2d 556).

III

CONCLUSION

Appellee submits that a review of the record herein discloses that appellee, in his capacity as judge of the Superior Court tried and convicted appellant of violation of a state statute; that there was no clear absence of all jurisdiction in appellee; that appellee is judicially immune to suit in this case; and that, in any event, appellant could not state a cause of action for declaratory relief as to a matter which had already been finally determined by the courts almost a decade ago.

Appellee submits, therefore, that the decision and judgment of the United States District Court should be affirmed in this case.

Respectfully submitted,

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and

DONALD K. BYRNE,
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Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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